Opposition to Petition for Writ of Certiorari

Opinions Below

The *en banc* opinion of the court of appeals (Appendix to Petition for Writ of Certiorari 1a-86a ("App.")) is reported at 416 F.3d 738 (8th Cir. 2005). The panel opinion of the court of appeals (App. 88a-122a) is reported at 361 F.3d 1035 (8th Cir. 2004). This Court's decision (App. 123a-180a) is reported at 536 U.S. 765 (2002). The court of appeals' first decision (App. 183a-272a) is reported at 247 F.3d 854 (8th Cir. 2001). The decision of the district court (App. 273a-307a) is reported at 63 F. Supp. 2d 967 (D. Minn. 1999).

Jurisdiction

The court of appeals sitting *en banc* entered its judgment on August 2, 2005. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

Constitutional, Statutory and Regulatory Provisions

The relevant provisions of the United States Constitution and Minnesota's Code of Judicial Conduct are set forth at App. 323a-327a.

Statement of the Case

Respondents substantially agree with the Statement of the Case presented by the Petitioners in their Petition for Writ of Certiorari at 1-10 ("Petition").

Reasons for Denying this Petition

This Court has no reason to exercise its discretionary authority to review the *en banc* decision of the Eighth Circuit. The decision below held certain provisions of the Minnesota Code of Judicial Conduct unconstitutional because they clearly prohibited speech and association by judicial candidates in a manner forbidden by this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Minnesota's bans on judicial candidates attending political party gatherings, identifying themselves as members of a political party, seeking, accepting, or using political party endorsements, and personally soliciting contributions from large groups cannot be justified under the Constitution.

The decision below created no conflict in the federal circuits or with any state court of last resort in any respect, and the Petitioners do not claim that it does. Indeed, the Eighth Circuit's holding striking down the ban on personal solicitation mirrors the decision of the Eleventh Circuit in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

The decision below also does not contradict any decision of this Court. It is not inconsistent in any way with this Court's decision in *White*, and its holding striking down the ban on partisan political identification and endorsement also follows the decision of this Court in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989).

There is not even a conflict created with any federal district court decision or decision of any inferior state court. And even the inferior court decisions that Petitioners erroneously claim demonstrate "confusion" below in the wake of *White* concern provisions that were not even at issue in the Eighth Circuit decision.

Petitioners' request is really only based on their objection to *White* itself. It is actually based on policy, not law. It amounts to little more than an undisguised plea to reverse or to radically limit the scope of this Court's decisions in *White* and

Eu. But such a claim does not justify review under Supreme Court Rule 10.

Certainly, review by this Court of the issues decided by the Eighth Circuit would be extremely premature. The Eighth Circuit's decision on the issue of partisan identification and endorsement is a matter of first impression in the circuit courts. There is only one other circuit court decision on the issue of personal solicitation, and it is in agreement. Moreover, the whole matter of the proper scope of restrictions on judicial speech and association in the wake of *White* remains the subject of debate by legal scholars and authorities, as evidenced by the American Bar Association's continuing consideration and discussion of the matter. Thus, consideration of the issues raised by the Eighth Circuit's decision by this Court should await development of the law in the lower courts, review by legal authorities, and the responses of the States to this Court's decision in *White* through revisions of their judicial codes.

I. The Decision Below Creates No Conflict in the Circuits or with State Courts of Last Resort.

The *en banc* decision of the Eighth Circuit creates no conflict whatsoever with any decision by any court of any jurisdiction, much less any decision of any Circuit. Petitioners cannot and do not cite any case that conflicts with the Eighth Circuit decision striking down either Minnesota's solicitation clause or its partisan identification and endorsement clauses. So review by this Court is not warranted on this basis.

Rather than cause discord, the decision below is entirely consistent with the post-*White* decisions of all circuit and state courts of last resort on similar or related issues. It represents harmonious and consistent development of the law rather than an aberration or a decision that introduces conflict in appellate court interpretations of *White*, that would demand resolution by this Court.

A. There Is No Conflict Created by the Eighth Circuit's Decision on Minnesota's Partisan Identification and Endorsement Provisions.

The *en banc* Eighth Circuit's decision finding that the partisan identification and endorsement provisions[1] are unconstitutional created no conflict with the decision of any Circuit or any State court of last resort. This is a case of first impression on appeal; it is not a case ripe for review by this Court.

B. There Is No Conflict Created by the Eighth Circuit's Decision on Minnesota's Solicitation Clause.

Likewise, the Eighth Circuit decision striking down Minnesota's solicitation clause creates no conflict among Circuits or with state supreme courts. To the contrary, it is fully consistent with the only other decision by a Circuit.

The Minnesota solicitation clause states that: "A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support." Canon 5B(2). The Eighth Circuit held the clause unconstitutional because it failed to advance any interest in judicial impartiality described either as an interest in protecting against "bias for or against a party to a case," App. 45a, or as an interest "articulated as openmindedness."[2] *Id.* at 46a.

---

[1]52 Minn. Stat., Code of Judicial Conduct, Canon 5A(1), states that judge[s] and "candidate[s] for election for judicial office shall not":

> (a) . . . identify themselves as members of a political organization, except as necessary to vote in an election . . . .
>
> (d) attend political gatherings; or seek, accept or use endorsements from a political organization.

Canon 5B(2) states that judicial candidates and their campaign committees may not "seek, accept or use political organization endorsements."

[2]This Court in *White* considered, but did not find, that the state

(continued...)

Likewise, the Eleventh Circuit has held unconstitutional Georgia's solicitation clause,[3] which provided that judicial candidates "shall not solicit campaign funds, or solicit publicly stated support." *Weaver*, 309 F.3d at 1322. Georgia's clause was "not narrowly tailored to serve Georgia's interest in judicial impartiality." *Id.* As the *Weaver* court explained,

> [I]mpartiality concerns, if any, are created by the State's decision to elect judges publicly. Campaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community. See, e.g., *White*, 122 S. Ct. at 2542 (O'Connor, J., concurring) ('Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns . . . the cost of campaigning requires judicial candidates to engage in fundraising.") The fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected. Furthermore, even if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate's agent to seek these contributions and endorsements on the candidate's behalf rather than the candidate seeking them himself. Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support. Canon 7(B)(2) thus fails strict scrutiny because it completely chills a candidate's speech on these topics while hardly advancing the state's interest in judicial impartiality at all.

---

[2](...continued)
compelling interest in impartiality included an interest in "openmindedness." *Id.* at 778-79.

[3]Georgia Code of Judicial Conduct Canon 7(B)(2).

309 F.3d at 1322-23.

Thus, the language of the Georgia solicitation canon was virtually identical to the language of the Minnesota clause. Moreover, the rationale of both Circuits is virtually the same: Both Circuits, following *White*, held that the "solicitation clauses" were subject to strict scrutiny and they were not narrowly tailored to satisfy any asserted State interest in securing judicial impartiality.

If anything, the *en banc* holding of the Eighth Circuit tracks *White* even more closely than the Eleventh Circuit in *Weaver*. Minnesota Canon 5(B)(2) specifically provides that campaign contributions should be made to campaign committees, which "shall not disclose to the candidate the identity of the campaign contributors," thus almost entirely foreclosing any possibility that campaign solicitations by candidates could lead to corruption.[4] As the *en banc* Eighth Circuit held, it is thus "unlikely. . . that a judicial candidate, if elected, would be a 'judge [who] has a direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against [a litigant in a case]' based on whether that litigant had contributed to the judge's campaign."App. 44a (*quoting Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). The Georgia Judicial Code provided no such added insurance against claims of judicial partiality arising from personal solicitation of campaign funds by judicial candidates.

Certainly, there is no conflict between Circuits in holding that absolute prohibitions on judicial candidate solicitations for campaign support violate the Constitution. The two Circuits to have addressed the issue in the wake of *White* both agree that

---

[4]In addition, Plaintiffs here attacked the Minnesota solicitation clause only to the extent that it prohibited judicial candidates from personally soliciting contributions from large groups or from signing letters seeking contributions, Petition 4; 46a, while the *Weaver* plaintiffs facially attacked the Georgia solicitations clause. 309 F.3d at 1317.

they do. There is no decision of any state court of last resort to the contrary.

C. Lack of Conflict of Circuits and Courts of Last Resort Proves the Prematurity of Any Review of the Decision of the Eighth Circuit in This Case.

That there is no conflict in the circuits, state courts of last resort, or even among lower courts on the issues addressed by the *en banc* Eighth Circuit decision is not surprising in view of the fact that this Court has only recently addressed the matter of judicial speech in context of judicial elections. The Eighth Circuit decision represents only the first comprehensive analysis and application of the principles announced in *White*, and it would be premature for this Court to accept it for review without the benefit of further development and elaboration of the law by lower courts.

Moreover, further consideration by this Court of these matters should also await an authoritative final response by the legal community to *White*. The American Bar Association (ABA) Joint Commission to Evaluate the Model Code of Judicial Conduct has only recently, on December 14, 2005, posted its Final Draft Report.[5] The ABA Commission is receiving comments on the Draft until March 15, 2006, and then submit its recommendations to the ABA House of Delegates. It is too early to know what final canons will be recommended, or how such revisions might be received by the States.

---

[5] *See* http://www.abanet.org/judicialethics/finaldraftreport.html.

II. The Decision Below Presents No Conflict With Prior Decisions of This Court.

A. The Decision Below Is Fully Consistent With This Court's Decision in *Republican Party of Minnesota v. White* in Striking Down Both Minnesota's Partisan Identification and Endorsement Provisions and Its Solicitation Clause.

The *en banc* decision of the Eighth Circuit clearly and consistently applied the logic and principles announced by this Court in *White* to both the partisan identification and endorsement provisions and solicitation clause. Petitioners do not claim otherwise and thus review is not justified on this basis.

B. The Decision Below Is Fully Consistent With This Court's Decision in *Eu v. San Francisco County Democratic Cent. Comm.*

Further, this Court has already declared unconstitutional state laws prohibiting political parties from endorsing candidates for public office and prohibiting candidates for public office from seeking these political party endorsements. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989). The Eighth Circuit decision is fully consistent with *Eu*, and the Petitioners objection is really to *Eu*, not to the Eighth Circuit's decision striking down the partisan identification and endorsement provisions.

Eu involved two California state laws relevant to the Petition. California Election Code § 11702 provided that the "official governing bodies" of political parties "shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." California Election Code § 29430 further provided it was a misdemeanor for any primary candidate to claim that she is the officially endorsed candidate of the party. The *Eu* Court struck down both laws under the First Amendment.

The Court first rejected that the State had a compelling state interest in preventing intra-party friction during a primary

election. *Eu*, 489 U.S. at 227-228. Relevant here, the Court then found that the State's alleged compelling interest in avoiding confusion to the voters to be "paternalistic," *id.* at 223, stating that "a 'State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism'" *Id.* at 228 (*quoting Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 221 (1986) (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983))). The Court then noted that other groups were not prohibited from endorsing candidates and noted how those endorsements had not sowed seeds of confusion among the electorate, *Eu*, 489 U.S. at 228 n.18, then finally observed that there was simply no evidence to support the State's claim that the ban on endorsement served its alleged compelling state interest in avoiding confusion to the voters. *Id.* at 229.

Similarly, Minnesota's ban on partisan identification and endorsement forbid judicial candidates from identifying themselves as members of a political party, from seeking, accepting or using a political party endorsement, and from attending or speaking at political party gatherings. Minnesota alleges two compelling interests in support of this ban: protection against the appearance of a biased judiciary or a judiciary not having an open mind in deciding issues and protection of the separation of powers under Minnesota's constitution. Petition 26-30.

First, Petitioners' claim that restricting the flow of information to the voters through the political party bans is necessary to avoid Minnesota's citizens from perceiving their judiciary of being "biased," or lacking in "open mindedness," must be viewed with the same "skepticism" as the *Eu* Court regarded California's similar claim. Second, as in *Eu*, the State presents no evidence, but only the bald assertion that their judiciary will be viewed as biased or lacking in openmindedness absent the political party bans. Third, as in *Eu*, Minnesota's bans are woefully underinclusive, because the State does not ban judicial candidates from seeking, accepting

or using the endorsement of *other* political groups, of identifying themselves as members of *other* political groups, or from attending or speaking at the functions of *other* political groups. While underinclusiveness is not necessarily fatal to a State law, laws which are underinclusive cast great doubt on how actually "compelling" is the state's alleged compelling state interest. *White*, 536 U.S. at 779.

The Eighth Circuit's decision in this regard thus follows this Court's decision in *Eu*. It does not warrant plenary review on this basis.

III. This Case Does Not Present an Important Federal Question.

Without any conflict among the Circuits, the state courts of last resort, or this Court on the substantive issues addressed by the Eighth Circuit, the Petitioners nevertheless claim that "Confusion Reigns in State And Federal Courts," which "desperately require guidance." Petition 23. They claim that the Eighth Circuit decision creates a "crisis" that (1) erodes public confidence in the judiciary in "dozens of states" by striking down Minnesota's blanket ban on personal solicitation of funds by judicial candidates, *id.* at 13, (2) "eviscerates" all efforts of the States to forbid judicial candidates' partisan political activities by striking down the partisan identification and endorsement provisions, *id.* at 16, and (3) undermines the very structure of state governments by subverting separation of judicial power from the partisan politics. *Id.* at 20.

These claims do not state any cognizable basis for review under Supreme Court Rule 10. "Confusion" does not warrant this Court's review, unless it is manifested by a conflict in the Circuits which is absent here. In addition, "confusion," which amounts to a claim that this Court erred in *White* and *Eu*, or at least that the Eighth Circuit erred in applying some rule of law – rarely warrants this Court's discretionary review.

Furthermore, consistent and faithful application of the teachings of this Court's decision in *White* is not a "crisis,"

until and unless it is manifested in conflicting decisions of the Circuit courts. Such a conflict does not exist.

In any event, the claim of "confusion" and "crisis" is false. The Eighth Circuit decision clarifies rather than confuses, and it is simply an important first step in the application of the principles announced by this Court in *White* and *Eu*. And if "confusion" and "crisis" ever become manifest because some Circuit disagrees with the Eighth Circuit, this Court's rules will then allow this Court to resolve it.

A. There Is No "Confusion" in the Lower Courts That Warrants Clarification by This Court.

The Petitioners can show no confusion in the lower courts caused by the decision below or among the lower courts in the wake of *White*. Case law is developing in a consistent and logical manner.

Indeed, the only case cited and quoted by the Petitioners, Petition 23, in support of their claim of hapless judicial uncertainly in the wake of *White* in the lower courts is a single district court case, *North Dakota Family Alliance v. Bader*, 361 F. Supp.2d 1021, 1041-42 (D. N.D. 2005), which concluded without difficulty that North Dakota's prohibitions on judicial candidates making pledges or promises or making commitments was unconstitutionally overbroad, when applied to answering questionnaires that simply requested judicial candidates' views on legal and political issues. *Id.* at 1044.[6] These

---

[6]The North Dakota decision is consistent with all the lower court decisions regarding the "pledges and promises" and "commits" clauses. In *Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Comm'n*, 388 F.3d 224 (6th Cir. 2004), the Sixth Circuit held that Kentucky could not demonstrate a likelihood of success on the merits in justifying their "pledges or promises" or "commits" clauses. The *Family Trust* court held that, "although the Supreme Court's decision in *White* applied only to an announce clause," the district court's preliminary injunction should stand because "the State

(continued...)

clauses have nothing to do with the Eighth Circuit decision.[7]

Since there is no confusion among the lower courts on the meaning or application of *White* to the partisan identification and endorsement provisions and to the solicit clause, Petitioners erect a strawman: They suggest that there is post-*White* confusion in the lower courts on whether the standards for judicial elections should be the same as for legislative and executive elections, citing a few cases that they claim represent limiting *White* exclusively to bans on judicial speech expressing views on political or legal issues. Petition 23-24 (*citing In re Raab*, 793 N.E.2d 1287 (N.Y. 2003); *In re Watson*, 794 N.E.2d 1 (N.Y. 2003); *In re Kinsey*, 842 S. 2d 77 (Fla. 2003); *In re Angel*, 31 Fla. Bar New, No. 23 (July 1, 2004); *In re Dunleavy*, 838 A.2d 338 (Me. 2003)).

---

[6](...continued)
has enforced the promise and commit clause as a *de facto* announce clause, and therefore the State is unlikely to succeed in light of the binding precedent in *White*." 388 F.3d at 227. *See also Alaska Right to Life v. Feldman*, 380 F. Supp.2d 1080 (D. Alaska 2005) (stating that "pledges or promises" and "commitment" clauses were unconstitutional when construed to forbid judicial candidates from announcing views on political/legal issues); *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp.2d 672 (E.D. Ky. 2004) (same). *Also see Smith v. Phillips*, 2002 U.S. Dist. LEXIS 14913 (W.D. Tex. 2002) (holding unconstitutional judicial canon that prohibited a judicial candidate from "mak[ing] statements that indicate an opinion on any issue" that may come before him or her held unconstitutional).

[7]However, there is one district court decision that involves partisan political activities and it is consistent with the Eighth Circuit. *See O'Neill v. Coughlan*, No. 04 Civ. 1612 (N.D. Ohio, Sept. 14, 2004), *available at* http://www.legalaffairs.org/howappealing/20040914ONeillinjunction.pdf. (granting preliminary injunction against the Ohio Supreme Court Disciplinary Counsel, staying disciplinary proceedings against the judge for identifying himself as a member of a political party and for stating his views on the Ohio Supreme Court).

Of course, even if such confusion existed, it is neither explicitly addressed by one of the Questions Presented for Review here nor even implicitly suggested by the *en banc* Eighth Circuit decision at issue. Thus, this argument involves judicial canons not at issue herein and, with respect to which, the Petitioners apparently want this Court to issue an advisory opinion. In any case, however, none of the cited cases supports Petitioners' claim.

In re Raab upheld New York rules, limiting judicial candidates' contributions to political parties or other candidates, established "to ensure that political parties cannot extract contributions from persons seeking nomination for judicial office in exchange for a party endorsement." 793 N.E.2d at 325. *Dunleavy* upheld Maine's rule prohibiting judicial candidates from soliciting funds for contributing to other political candidates or political parties. 338 A.2d at 342. Neither of these cases involve provisions similar to the ones at issue here.

The other cases the Petitioners cite have to do with the application of *White* to "pledges or promises" or "commits" clauses, which are not at issue here and which may present an entirely different set of issues. In *In re Watson*, the New York Court of Appeals upheld the constitutionality of its "pledges or promises" clause, noting that "most statements identifying a point of view will not implicate the 'pledges or promises' prohibition" and that the "rule precludes only those statements of intention that single out a party or class of litigants for special treatment, favorable or unfavorable." 794 N.E.2d at 7. The case thus represents an authoritative construction by a state's highest court of that state's "pledges or promises" clause in a manner that conceivably avoids *White*'s condemnation. The same conclusion applies to *Kinsey*, where the Florida Supreme Court upheld its "pledges or promises" clause – which the Florida court authoritatively stated did not prohibit a "candidate from discussing philosophical beliefs" – in the face of a challenge by a judge who, as judicial candidate, "pledged her support and promised favorable treatment for certain parties

and witnesses who would be appearing before her." 842 So. 2d at 88-89.[8]

In sum, the lower courts have efficiently applied the general principles of *White*. There is no indication that they will not continue to do so, and the pleas of the Petitioners and their Amici for this Court to review this case on the grounds of "confusion" amount to nothing more than a request for an advisory opinion on issues not at issue here, or to micromanage the development of law in the lower courts.

B. The Eighth Circuit Decision Striking Minnesota's Absolute Ban on Personal Solicitation Creates No "Crisis" In the Lower Courts.

The Petitioners also request review of the blanket ban on personal solicitation of funds, claiming that the prohibition of such solicitations in 28 states is drawn into question, which is said to erode public confidence in the judiciary in "dozens of states." Petition 13, 13 n.5. Petitioners, however, grossly overstate the decision's scope and its conceivable impact on public perception of judicial impartiality.

First, the decision obviously only governs the seven states of the Eighth Circuit, and it directly affects only those with similar solicitation bans.[9] Thus, the matter is not resolved in the remaining 43 states, of which 23 have personal solicitation bans

---

[8] *In re Angel* was a disciplinary action involving a Florida judge accused of partisan political activities for attending political gatherings in violation of a Florida canon in which the canon was not even challenged under *White* on constitutional grounds. *See Inquiry Concerning a Judge, Re: Carven D. Angel*, 867 So. 2d 379 (Fla. 2004).

[9] Arkansas, Ark. Code Ann., Code of Jud. Cond., Canon 5C(2); Missouri, Mo. Rules of Court, Code of Jud. Cond., Canon 5B(2); Nebraska, Neb. Court Rules & Procedure, Code of Jud. Cond., Canon 5C(2); North Dakota, N.D. Court Rules, Code of Jud. Cond., Canon 5C(2); and South Dakota, S.D. Codified Laws, ch. 12-16, app., Code of Jud. Cond., Canon 5C(2).

of some sort. The matter was also resolved for the 3 states of the Eleventh Circuit in *Weaver*, but this still leaves the matter unresolved for 40 states, of which 21 have some personal solicitation ban, and for 8 of the 10 Circuits. Thus, rather than suggesting some judicial crisis demanding this Court's attention and resolution, Petitioners' argument thus actually underscores the relative novelty of the matter in the lower courts and the prematurity of present plenary consideration of the matter by this Court.

Second, the only "error" that Petitioners point to is a claimed neglect of the State's interest in avoiding the appearance of partiality arising from judicial candidates' personal requests for contributions to be sent their campaign committees. Petition 14-15. But the plaintiffs in this case attacked the Minnesota "solicitation clause" for overbreadth on the grounds that it forbids candidates from personally soliciting contributions from large groups or from signing letters seeking contributions, when Minnesota also forbids candidate campaign committees from disclosing to candidates the source or amount of any contribution. So any claimed error in application of *White* here is far too narrow to support the contention that it amounts to an assault on the laws of "dozens" of States – much less to warrant plenary review by this Court.

C. The *En Banc* Eighth Circuit Decision Holding Unconstitutional the Minnesota Partisan Identification and Endorsement Provisions Creates No "Crisis" Among the States.

Petitioners argue that this Court should accept review of the partisan identification and endorsement provisions, because holding them unconstitutional "eviscerates" all efforts of the States to forbid judicial candidates' partisan political activities. Petition 16.

First, their claim neglects and blurs the fundamental distinction between state regulation of *elections* and regulation of political *campaigns*. The States have "broad power" to

proscribe the procedural mechanisms for holding elections. *Tashijian*, 479 U.S. at 217. This Court has upheld generally applicable and evenhanded restrictions that protect "the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9.

But the decision below concerns only the conduct of judicial *campaigns* – and it is during campaigns that the very of purpose of the First Amendment in a democratic system is most at issue. Minnesota's ban is on non-partisan elections. *See Peterson* v. *Stafford*, 490 N.W.2d 418, 425 (Minn. 1992). Non-partisan elections are elections in which the judicial candidate is not identified by political party on the ballot or is not nominated by political parties. These non-partisan elections are unchallenged and fully intact in this case. Respondents have not challenged Minnesota's provisions for non-partisan judicial elections.

Second, Petitioners again grossly overstate the actual effect of the Eighth Circuit decision. Respondents have only challenged the provisions that relate to political party identification and endorsements, not numerous other provisions of the Minnesota Code of Judicial Conduct which limit judicial candidate involvement in the leadership of political party organizations, in endorsing or opposing other political candidates, in speaking on behalf of political party organizations, and in fundraising for political party organizations. *See generally* Minn. Code Jud. Cond., Canons 5A(1) and 5B(2).

Moreover, only 9 other states of the 19 states with non-partisan judicial *elections* (*elections* in which the party of the candidate is not disclosed on the ballot) have partisan activity *campaign* bans similar to those held unconstitutional here. Petition 17 n.8. Of these, only Arkansas and South Dakota are directly affected by the Eighth Circuit decision, so 7 of the 10 states with non-partisan elections remain unaffected. *Id.*[10]

---

[10]From 1913 to 1970, Minnesota conducted non-partisan

(continued...)

The decision below has absolutely nothing to do with the ability of the States to conduct non-partisan judicial *elections*. It affects only judicial *campaigns* in a small minority of States and there remains ample room for further judicial consideration of the matter in other Circuits and in the state courts.

Finally, the State's interest in avoiding the appearance of judicial impartiality are not rationally served by a rule forbidding judges from publicly disclosing their political party affiliation and endorsements – pretending that a State interest in judicial impartiality is properly served by a rule that creates a veil of voter ignorance in order to foster voter illusion.

D. The Decision Below Does Not Subvert State Governmental Structure.

Finally, Petitioners also claim that the Eighth Circuit's decision threatens the framework of state governments, which have attempted to keep judges free from partisan politics. According to the Petitioners, the decision below "belittled the State's interest in having two political branches and a distinct, nonpolitical judicial branch." Petition 20.

First, Petitioners's claim that the partisan identification and endorsement ban protects the separation of powers under the Minnesota Constitution is unfounded. Petitioners refer to "separation" as a separation of judicial candidates from political parties. *Id.* But political parties are not "powers" under the Minnesota Constitution – they have no constitutional status. The powers separated under the Minnesota Constitution are the powers of legislative, executive and judicial branches. Banning judicial candidates from associating with political parties does

---

[10](...continued)
legislative elections. *Independent Republican Party v. Spannaus*, 295 N.W.2d 650, 655 (Minn. 1980). However, there was no effort to ban political parties from participating in those campaigns in order to preserve the "non-partisan" character of those elections, and the Minnesota Supreme Court did not deem any such interest sufficient to override First Amendment considerations. *Id.* at 654-56.

nothing to enhance or protect "separation of powers," as recognized under the Minnesota Constitution.

Second, it is impossible to see in any event how the Eighth Circuit's decision undermines the fundamental nature of Minnesota's governmental structure when its Constitution requires judicial elections just as it requires elections for the State's legislative and executive branches. That Minnesota conducts judicial elections assumes that there will be controversial rivalries and policy differences among candidates for judicial office – and political party support of certain candidates is merely one expression of those differences. In other words, Minnesota explicitly rejects the very concept of impartiality that the Petitioners' would impose upon it as preferred policy, because the People of Minnesota have chosen to conduct judicial elections. Thus, far from "trampling" on the State's authority to structure their own governments, Petition 19, the Eighth Circuit decision reconciles Minnesota's judicial code with the fundamental premise of a state system in which the judiciary is elected and with the U.S. Constitution's protections for free speech and association.

Third, the Petitioners' argument is based on the unproven premise that political parties pose some special danger of corruption that special interest groups and individuals do not. The challenged provisions only forbids judicial candidates from identifying themselves as members of a political party, from attending political party meetings, and from seeking, accepting, or using political party endorsements. They forbid none of these things with respect to other political organizations: bar associations, manufacturing associations, farm organizations, unions, or any other special interest ranging from Mothers Against Drunk Driving to the National Abortion Rights Action League to the National Rifle Association to the National Association for the Advancement of Colored People. Petitioners offer no evidence whatsoever that these special interest political organizations pose any less danger to judicial impartiality than do political parties.

To the contrary, special interest groups might very well pose a greater threat to judicial impartiality, precisely because they tend to focus on specific issues to exclusion of all else, while parties are likely to be more tolerant of divergent views because they seek majoritarian consensus. The partisan identification and endorsement bans devalue political parties, and a relative "decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidates vote on a single issue." *Branti v. Kinkel*, 455 U.S. 507, 532 (1980) (Powell, J., dissenting). It follows that special interest groups should have a particular interest in supporting bans on political party participation in judicial elections.

Finally, to the extent that bans on political party association and speech by judicial candidates effectively diminish the totality of speech in judicial campaigns, such bans increase the already inherent advantages of incumbency. Incumbents thrive on name recognition and the stature it brings, and challengers require extra help in overcoming this advantage that is denied them when political parties are effectively out of the picture. As the Eighth Circuit found, "the fruits of Canon 5 [the solicitation clause] appear to bear witness to its remarkably pro-incumbent character." App., 32a, n.9. The ban on partisan identification and endorsement are more calculated to insulate incumbents in office than to assure judicial impartiality.

So it makes no sense to argue without evidence that the Eighth Circuit's decision subverts Minnesota's system of elective democracy by simply permitting judicial candidates to speak to and associate with political parties to the same degree that they may speak to and associate with other all other political organizations and individuals.

IV. The Decision Below Properly Balances the First Amendment Rights of Candidates and Citizens Against the State's Interest In Preserving Judicial Impartiality.

A. The Eighth Circuit Properly Struck Down the Solicitation Clause.

The Eighth Circuit correctly found that Minnesota's solicitation clause violates the First Amendment guarantee, because the clause is not narrowly tailored to serve the state's compelling interest in an impartial judiciary. App. 44a.

Petitioners argue that the court erred because, without the solicitation clause, judges will feel pressured to decide cases in accordance with the wishes of their campaign contributors rather according to the law; therefore, judges will not be impartial or openminded – which Petitioners claim are the compelling interests justifying the clause. Petition 25-26. However, Petitioners' complaint is really against contributions to judicial candidates generally, not a candidate's solicitation of them. Further, for contributions to have such an effect, judges must know who has made them, which is prohibited by other provisions of Minnesota's code. Canon 5B(2). Thus, the solicitation clause itself does not protect the state interests in openmindedness or impartiality *at all*.

Moreover, the solicitation clause is not narrowly tailored since it goes well beyond personal one-on-one solicitations, the restriction of which the Respondents do not challenge, but to candidate requests for contributions made during a speech to large gatherings, or through fundraising letters. Judicial candidates cannot trace any specific contributor who makes a contribution as a result of such general solicitations (even if they know who their contributors are).

Thus, because judicial candidates are prohibited from knowing the identity of the *individual* contributor to their campaign, there can neither be actual bias, or the appearance of such bias, in favor of the *individual* contributor. Only the most

cynical of citizens could conclude that an anonymous donor's campaign contribution to a judicial campaign could create a "quid pro quo" from a judicial candidate who is legally prohibited from ever knowing there was a "quid."

Finally, the State would be on much firmer constitutional ground if it addressed the alleged evils of campaign contributions by regulating campaign contributions themselves. Contribution limits are used to address the undue influence resulting from large contributions. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). While Minnesota has stringent contribution limits for virtually all state elected officials, Minn. Stat. § 10A.27, there are no contribution limits for judicial candidates. As a result, judicial campaigns in Minnesota can accept unlimited contributions from any individual or group.

B. The Eighth Circuit Properly Struck Down the Partisan Identification and Endorsement Clauses.

The Eighth Circuit properly found that Canon 5's outright bans on judicial candidates speaking to, accepting the endorsement of, or identifying themselves as members of political parties violated the First Amendment because they did not serve the state's alleged compelling interests in protecting judicial impartiality, non-partisan elections, or separation of powers.

First, Petitioners argue that judicial candidates will feel "beholden" to political parties if they seek their endorsement, or that the public will believe that judges are biased if they are endorsed by, or identified with, a political party. Petition 30. However, in order for a state law to survive strict scrutiny, the law must be supported by a compelling interest. If the State leaves appreciable areas of the claimed compelling interest unprotected, the law is "underinclusive." Underinclusive laws rarely survive strict scrutiny, because the fact that the state left appreciable areas of the allegedly compelling interest unprotected undermines the state's claim that the interest is genuinely compelling. *White*, 536 U.S. at 779 (2002); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792-93 (1978). In fact,

the whole purpose of strict scrutiny is to "smoke out" whether the State's purpose in enacting the law at issue is to genuinely protect the allegedly compelling interest or actually furthers some other less-than-compelling or even illegitimate interest. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 441-42 (1985)

The Eighth Circuit found the partisan identification and endorsement bans "woefully underinclusive." App. 27a. The whole thrust of Petitioners' claim is that, if judicial candidates associate with political parties during their campaigns, the candidate will feel beholden to the political party and decide issues in accordance with their wishes. Petition 28-30. Yet, although the partisan identification and endorsement provisions prohibit judicial candidates' association with political parties, they do nothing to prohibit judicial candidates from obtaining the publicly stated support of other groups or individuals with equal or greater potential for corrupting influence on the judicial process. Thus, as the Eighth Circuit concluded, the real purpose behind the partisan identification and endorsement prohibitions could not be "judicial openmindedness." App. 32a. Rather, the effective purpose behind these provisions was to protect incumbency. *Id.* at 32a n.9.

Second, Petitioners argue that the political bans are necessary to protect the "non-partisan" nature of Minnesota's judicial elections. Again, Petitioners fundamentally confuse an "election" with a "campaign." All a "non-partisan" election means is that the candidate's political party affiliation does not appear on the *election ballot on election day*. Non-partisan elections have nothing to do with *campaigns* and do not mean that political parties cannot support candidates or that candidates cannot seek the support of the political party during the *campaign*. *See California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996) (ban on judicial candidates seeking political party endorsement based on the grounds that judicial elections are "non-partisan" is unconstitutional); *Mississippi Republican Party State Executive Comm. v. Musgrove*, No. 3:2CV1578HTW (S.D. Miss. Oct. 21, 2002) (holding it unconstitutional to bar party

endorsements for judicial candidates). The partisan identification and endorsement bans thus do not serve any legitimate interest in protecting non-partisan elections.[11]

Petitioners' claim that the plainly underinclusive character of the partisan identification and endorsement provisions can be

---

[11]Notably, even the Minnesota Supreme Court seems of two minds on whether there is an overriding Minnesota interest that justifies the partisan identification and endorsement provisions. The court previously declared that state laws requiring candidates who declare themselves as "independent" in partisan elections to sign an affidavit that they will not seek, accept, or use the endorsement of a political party violate the candidate's right to associate with political parties under the U.S. Constitution. *Minnesota Fifth Congressional District Independent Republican Party v. Spannaus*, 295 N.W.2d 650 (Minn. 1980). As the court stated:

> The Minnesota statute challenged here is an attempt by the legislature to exercise control over the "quantity and range" of political expression by independent candidates and local parties. As respondent has noted, the statute not only prescribes qualifications for ballot access but also seeks to control the speech, association and conduct of independent candidates and prospective supporters during the campaign. It thus unconstitutionally restricts First Amendment rights of expression and association.

Spannaus, 295 N.W.2d at 655.

The Minnesota Supreme Court did refuse to repeal the partisan identification and endorsement bans in 2004 after the *White* decision (despite the advise of its own Advisory Panel – App. 7a-8a, n. 3 – because of the court's concern that judicial candidates will be, in the words of Petitioners, "declaring allegiance to a political party and its platform." Petition 11. However, in *Spannaus*, the court found that political parties were too diverse to be concerned about such allegiances: "Major parties encompass candidates of greater diversity. In many situations the label 'Republican' or 'Democrat' tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum." *Spannaus*, 295 N.W.2d at 654 n. 3 (*quoting Buckley v. Valeo*, 424 U.S. 1, 70 (1976)).

justified under the same rationale that *U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), upheld restrictions on the political activities of federal employees through the Hatch Act, 5 U.S.C. § 7323; 15 U.S.C. §§ 1501, 150.. Petition 27-28. Their analogy fails badly: It is one thing to restrict the political speech and association of government employees; it is quite another to restrict the speech and associations of candidates for elective office. The voters have an obvious and constitutionally compelling interest in associating with and understanding the positions of candidates for office, while they have no such interest in the political views of non-elected governmental employees.

In sum, the Eighth Circuit's decision holding the Minnesota partisan identification and endorsement provisions unconstitutional is plainly supported by reason and precedent. It was correctly decided and does not warrant review by this Court.

Conclusion

On the basis of the foregoing, Respondents pray this Court to deny the Petition for Writ of Certiorari filed in this case.

Respectfully submitted,

William F. Mohrman
Erick G. Kaardal
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street
Suite 4100
Minneapolis, MN 55402
612/341-1074
612/341-1076 (facsimile)

James Bopp, Jr.,
Counsel of Record
Thomas J. Marzen
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)

(9)

FILED

No. 05-566

IN THE

Supreme Court of the United States

MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD ON JUDICIAL STANDARDS, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

MIKE HATCH
Attorney General
State of Minnesota

KRISTINE L. EIDEN
Deputy Attorney General

THOMAS C. VASALY
Assistant Attorney General

445 Minnesota Street
Suite 1100
St. Paul, MN 55101-2128
(651) 296-6752

THOMAS R. PHILLIPS
Counsel of Record
BAKER BOTTS L.L.P.
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, TX 78701-4039
(512) 322-2500

JEFFREY A. LAMKEN
MICHAEL G. PATTILLO, JR.
JACOB A. SOMMER
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

		Page
I.	Respondents All But Confirm The Importance Of The Questions Presented	2
	A. The Eighth Circuit's Decision Invalidates Judicial Canons Adopted By More Than Half The States	2
	B. The State Supreme Courts And Lower Federal Courts Are In Disarray	3
II.	This Case Implicates Interests Of The Highest Order	4
III.	Respondents' Merits Arguments Are Unsupported	6
	A. The Eighth Circuit Misread This Court's Decisions	6
	B. The Eighth Circuit's Analysis—And Respondents' Defense Thereof—Is Unpersuasive	8
IV.	The Court Should Hear This Case This Term.	10

TABLE OF AUTHORITIES

	Page
CASES	
Cal. Democratic Party v. *Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996)	7
Capital Cities Media, Inc. v. *Toole*, 463 U.S. 1303 (1983)	6
Eu v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989)	7, 8
Magill v. *Lynch*, 560 F.2d 22 (1st Cir. 1977)	6
McConnell v. *Fed. Election Comm'n*, 540 U.S. 93 (2002)	9
McEntee v. *MSPB*, 404 F.3d 1320 (Fed. Cir. 2005)	3, 6
McGee v. *Int'l Life Ins. Co.*, 355 U.S. 220 (1957)	2
Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000)	2
Raab, In re, 793 N.E.2d 1287 (N.Y. 2003)	3
Republican Party v. *White*, 536 U.S. 765 (2002)	*passim*
State ex. rel Young v. *Brill*, 111 N.W. 639 (Minn. 1907)	8
Stretton v. *Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991)	9
United States Civil Serv. Comm'n v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973)	7, 9
Weaver v. *Bonner*, 309 F.3d 1312 (11th Cir. 2002)	2, 3, 5

TABLE OF AUTHORITIES—Continued

Page

STATE REGULATORY PROVISIONS

In re Amendment of the Code of Judicial Conduct, No. C4-85-697 (Minn. Sept. 14, 2004) 8

In re Amendment to Rule 10, Rules of the Tennessee Supreme Court (Tenn. Oct. 11, 2005) 4

In re Amendment of Supreme Court Rules, No. 00-07, 2004 WI 134, 274 Wis. 2d xlvii (Oct. 29, 2004) 4

Miss. Rules of Court, Code of Judicial Conduct, Canon 5A, Commentary (amended Feb. 26, 2004) 4

Order re: Enforcement of Rule 2.03, Canon 5.B(1)(C), Campaign Conduct (Mo. July 18, 2002) (en banc) 4

42 Pa. Cons. Stat. Ann., Code of Judicial Conduct, Canon 7B(2) (amended November 21, 2002) 5

RULES

S. Ct. R. 10(c) 2

S. Ct. R. 25 10

MISCELLANEOUS

ABA Code of Judicial Conduct, Canon 5 (1990) 4

Debates and Proceedings of the Minn. Const. Conv. (St. Paul, Earle S. Goodrich, Territorial Printer 1857) 9, 10

Stern, Gressman, et al., *Supreme Court Practice* (8th ed. 2002) 2

REPLY FOR PETITIONERS

Respondents do not dispute that the Eighth Circuit's decision strikes down rules of judicial conduct adopted by more than half the States. Respondents concede that at least 29 States have prohibitions on direct solicitation, and 10 States have prohibitions on partisan activities, that are functionally indistinguishable from those held unconstitutional below. Br. in Opp. 14-16. Respondents nonetheless urge that the case does not warrant review because the Eighth Circuit's decision and a similar Eleventh Circuit decision are binding only on the eight States in those two circuits with similar prohibitions.

The argument all but answers itself. The fact that 20 percent of the many States with judicial elections now confront binding precedent striking down their laws—laws critical to the protection of judicial integrity, impartiality, and independence—itself underscores the importance of this case. But even outside the Eighth and Eleventh Circuits, the decisions create grave uncertainty for judicial candidates and officials charged with enforcing judicial codes. While the Eighth and Eleventh Circuits read *Republican Party* v. *White*, 536 U.S. 765 (2002) (Pet. App. 123a-180a), as rendering restrictions on partisan activities and personal solicitation unconstitutional, numerous state supreme courts—and the ABA Joint Commission in its recently proposed draft Model Canons of Judicial Ethics—have chosen to retain or enforce such restrictions despite *White*. Consequently, "no state * * * can be sure how to conduct an election, and no judicial candidate can know the boundaries of permissible campaign behavior." Br. ABA 4.

For that reason, those most interested in the quality of state-court justice—the ABA, the Conference of Chief Justices ("CCJ"), the American Judicature Society ("AJS"), former Chief Justices from 15 States, 10 sovereign States, and the Nation's leading legal ethics and constitutional law scholars—have filed *amicus* briefs urging this Court to grant the petition. So too have 40 of the Nation's largest corporations, including General Electric, Motorola, PepsiCo, and Pfizer—regular participants in the judicial process with a strong interest in ensuring that the judiciary neither is nor appears

beholden to financial and partisan supporters. See Br. Concerned Corporations 1-4.

I. Respondents All But Confirm The Importance Of The Questions Presented

A. The Eighth Circuit's Decision Invalidates Judicial Canons Adopted By More Than Half The States

Although respondents concede that more than half the States have restrictions similar to those the Eighth Circuit invalidated below, they urge that the decision has limited impact. In particular, they contend that the Eighth Circuit's decision in this case, and the Eleventh Circuit's similar decision in *Weaver* v. *Bonner*, 309 F.3d 1312 (11th Cir. 2002), are binding only in "the seven states of the Eighth Circuit" and the "3 states of the Eleventh Circuit." Br. in Opp. 14-15, 16.

The question before the Court right now, however, is not how many States are bound by the decision below—although the impact is substantial even by that measure, see p. 1, *supra*. It is whether this case presents "an *important question* of federal law" that warrants this Court's review. S. Ct. R. 10(c) (emphasis added). The fact that more than half of the States (and 75 percent of those with judicial elections) have adopted rules like those held unconstitutional by the Eighth and Eleventh Circuits makes the validity of those rules a question of national importance. Time and again this Court has granted review where, as here, widely adopted state statutes are held unconstitutional by the courts of appeals. See, *e.g.*, *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) (review granted "[g]iven the large number of States" with similar statutes); *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 221 (1957) (review granted because of issue's importance "not only to California but to other States which have similar laws"); see Br. ABA 6; Stern, Gressman, et al., *Supreme Court Practice* § 4.12, at 246 (8th ed. 2002) ("grant of certiorari on the basis of importance" often depends on "the impact of the ruling below upon the validity of similar statutes in other states").

When seeking this Court's review in *White*, respondents themselves urged that these issues have national importance.

They noted the widespread use of popular ballot to select state court judges; observed that the Minnesota canons at issue were "based in large measure on the ABA's Model Canons of Judicial Conduct"; and therefore declared that the validity of Minnesota's canons is "a matter of nationwide interest and importance." J.S. at 15-16, No. 01-521, *Republican Party* v. *White* (filed Sept. 24, 2001). Respondents offer no reason why the validity of those canons was important then but unimportant now. This Court, moreover, *granted review* in *White* to address the validity of the "announce clause"—a provision that barred candidates from announcing positions on disputed legal issues—even though it was then in effect in just nine States (only three of them in the Eighth Circuit) and had been dropped from the ABA's Model Code years earlier. Pet. App. 129a n.5; Br. AJS 7. This case, by contrast, seeks review of a decision invalidating restrictions that have been adopted by approximately 30 States (eight in the Eighth and Eleventh Circuits) and that remain in the ABA Model Code. It is impossible to say the issue raised in *White* was of national import but the issues raised here are not.

B. The State Supreme Courts And Lower Federal Courts Are In Disarray

Alternatively, respondents urge that "review by this Court" would be "premature," Br. in Opp. 3, because the "[c]ase law is developing in a consistent and logical manner," *id.* at 11. But state and federal courts have adopted wholly divergent readings of *White*. See Pet. 23-24. For example, New York's highest court has explained that *White* "did not declare * * * that judicial candidates must be treated the same as non-judicial candidates." *In re Raab*, 793 N.E.2d 1287, 1290 (N.Y. 2003) (per curiam). The Eleventh Circuit in *Weaver*, by contrast, reached the opposite conclusion, holding that, under *White*, "the standard for judicial elections should be the same as the standard for legislative and executive elections." 309 F.3d at 1321. The decision below is also irreconcilable with *McEntee* v. *MSPB*, 404 F.3d 1320, 1324-1325 & n.7 (Fed. Cir. 2005). See Br. Former Chief Justices 17-18.

The widespread disagreement is likewise reflected in the actions of state supreme courts in redrafting their rules after *White*. Many of those courts have adhered to (or like Wisconsin, reinforced) their prohibitions against partisan activities and personal solicitation in light of *White*. Br. Former Chief Justices 18; Br. AJS 6-14.[1] And the ABA Joint Committee's latest proposed Model Canons, revised in light of *White* and released after the decision below, retain provisions the Eighth and Eleventh Circuits have held unconstitutional. ABA Br. 15. Those decisions of the States' highest courts (and leading ethics authorities) cannot be reconciled with the Eighth Circuit's conclusion that such restrictions are unconstitutional.

Respondents' assertion that this Court should "await an authoritative final response by the legal community to *White*," including the ABA, Br. in Opp. 7, is thus wholly backwards. The "legal community," including the ABA, urges this Court to grant review *now* because no one can currently offer meaningful guidance on these issues. See p. 1, *supra*. The decisions in this case and *Weaver*, moreover, place the ABA in the untenable position of re-issuing Model Canons that are unconstitutional under the law of two circuits, or abandoning longstanding ethical prohibitions that protect "judicial independence, integrity, and impartiality." Br. ABA 10, 11-15.

II. This Case Implicates Interests Of The Highest Order

This case, moreover, concerns interests of the highest magnitude. The solicitation and partisan-activities restrictions invalidated below are critical to ensuring that state courts are—and are seen to be—free from the corrupting influence of money and unfettered by obligations incurred through partisan allegiances. The confusion over their validity profoundly

---

[1] See Miss. Rules of Court, Code of Jud. Cond., Canon 5A, Commentary (Feb. 26, 2004) (repealing announce clause, retaining solicitation clause); 42 Pa. Cons. Stat. Ann., Code of Jud. Cond., Canon 7B(2) (Nov. 21, 2002) (retaining solicitation clause); Enforcement of Rule 2.03, Canon 5.B(1)(C), Campaign Cond. (Mo. July 18, 2002) (en banc) (similar); In re Amendment to Rule 10, Rules of the Tennessee Supreme Court (Tenn. Oct. 11, 2005) (similar), In re Amendment of Supreme Court Rules, No. 00-07, 2004 WI 134, 274 Wis. 2d xlvii (Oct. 29, 2004) (similar).

"undermines the judiciary's ability to maintain public confidence in the courts." Br. AJS 15.

Respondents, for example, do not deny the appearance of impropriety that results when judges personally solicit campaign contributions from those with interests in the cases before them. Even large and influential corporations find such personal appeals "highly coercive." Br. Concerned Corporations 19. Minnesota's prohibition on personal solicitation—which separates the judge from requests for money by requiring a campaign committee to make such requests—"avoids the most egregiously coercive aspects of judicial campaign solicitation." *Id.* at 9. The decision below invalidates even that modest protection in a host of States and calls its validity into question throughout the Nation.

Likewise, the partisan-activities prohibition helps ensure that judges—unlike their counterparts in the political branches—do not become or appear beholden to political parties. Judges' singular loyalty to the law cannot be preserved when political parties, through the electoral process, become judge-makers. Sidestepping the issue, respondents urge that elections can remain "non-partisan" even when judges openly declare partisan affiliation and seek partisan support, because "the candidate's political party affiliation" still will "not appear *on the election ballot on election day*." Br. in Opp. 22. But experience has proven that, "without partisan activity restrictions, nominally nonpartisan judicial elections can readily be overtaken by politics as usual." Br. CCJ 16. For that reason, 10 States have concluded that regulating the partisan activities of judges and judicial candidates is necessary to ensure that elections are truly nonpartisan. Pet. 17 n.8; Br. AJS 6. Simply removing a candidate's party affiliation from the ballot does not prevent a judge from becoming beholden to a political party when the judge bases his campaign upon, owes his success to, and will be dependant for re-election on, party affiliation.[2]

---

[2] The Federal Circuit and the First Circuit have both recognized that, for Hatch Act purposes, a candidate's partisan campaign activities can transform a nominally nonpartisan election—*i.e.*, where the candidate's

Respondents' claim that the First Amendment requires the invalidation of such regulations likewise supports immediate review. Downplaying the significance of the decision below, respondents suggest that States in other circuits may freely enforce the judicial canons invalidated by the Eighth and Eleventh Circuits. Br. in Opp. 14-15, 16-17. But if respondents are correct on the merits, that threatened enforcement is imposing irreparable First Amendment injury on judicial candidates. See *Capital Cities Media, Inc.* v. *Toole*, 463 U.S. 1303, 1304 (1983). For that reason too, prompt review is warranted.

III. Respondents' Merits Arguments Are Unsupported

A. The Eighth Circuit Misread This Court's Decisions

1. Respondents also urge the Court to deny review because, in their view, the petition never disputes that the Eighth Circuit "clearly and consistently applied the logic and principles announced by this Court in *White* to both the partisan identification and endorsement provisions and solicitation clause." Br. in Opp. 8. But the petition explicitly states that the "Eighth Circuit misread *White* to preclude virtually any regulation of judicial elections, without regard to judges' unique status in our system of government." Pet. 12. And it explains that, far "from supporting the Eighth Circuit's decision, this Court's decision in *White* underscores the legitimacy of the solicitation and partisan-activities restrictions at issue here." *Id.* at 25.

In *White*, the Court acknowledged the State's compelling interest in "preserving the impartiality of the state judiciary"—particularly with respect to potential biases for or against *particular parties*—but it faulted the "announce clause" as an effort to limit *speech* about *legal issues*. Pet. 25. The provisions at issue here, however, do not regulate speech about legal issues. They "merely address *relationships*" between candidates for non-partisan office and powerful political parties, as well as proposals for *financial transactions* "with

---

party affiliation is not identified on the ballot—into a partisan one. *McEntee*, 404 F.3d at 1331-1332; *Magill* v. *Lynch*, 560 F.2d 22, 29 (1st Cir. 1977).

interested persons and parties—relationships that can create actual or apparent party bias, and interfere with judicial independence, by rendering the candidate seemingly beholden to political parties." *Ibid.* (emphasis added). The restrictions at issue here thus do not seek to muzzle speech related to official performance. They seek to ensure that, once elected, the judge's loyalty will be to the law—not to contributors or political parties.

2. Respondents' assertion that this case is controlled by *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989)—and the claim that petitioners' "objection is really to *Eu*," Br. in Opp. 8—is more puzzling still. The Eighth Circuit did not find *Eu* controlling, and with good reason. The rules at issue in *Eu* governed the speech of the *political parties* themselves, prohibiting the parties from endorsing candidates in *partisan primaries*. 489 U.S. at 216. Here, in contrast, the regulations address the political affiliation and fundraising conduct of *judges* and *judicial candidates*. That distinction—between regulating the "*parties' speech about candidates for office*, rather than (as [this] Court approved in *Letter Carriers*) a ban on *partisan political conduct of the officeholders themselves*"—is "crucial." *Cal. Democratic Party* v. *Lungren*, 919 F. Supp. 1397, 1402 (N.D. Cal. 1996). This Court has upheld laws regulating the partisan activities of executive branch officers, citing the compelling interest in ensuring that officials "administer the law in accordance with the will of Congress, rather than in accordance with their own will or the will of a political party." *United States Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564-565 (1973). The States are likewise entitled to regulate partisan activities that might threaten a judge's or candidate's ability to "administer the law" according to neutral principles "rather than in accordance with" financial interests "or the will of a political party." *Ibid.*; see Pet. 27-28.

In *Eu*, moreover, the State sought to regulate speech because of its communicative impact on voters, citing the potential for "undue influence" and "confusion." *Eu*, 489 U.S. at 225-226. It is one thing to regulate, as so many States have,